

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

DECISION AND ORDER

06-CR-6134L

v.

TERRELL JOHNSON,

Defendant.

By decision filed November 12, 2008, the United States Court of Appeals for the Second Circuit affirmed defendant, Terrell Johnson's, conviction but remanded to this Court for a review of Johnson's sentence pursuant to the procedure outlined in *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008). The test, under *Regalado*, is whether this Court now believes that at the time of the original sentence it would have imposed a non-trivially different sentence under the advisory Guidelines, especially in light of the United States Supreme Court decision in *Kimbrough v. United States*, 128 S. Ct. 558 (2007), which decision dealt with the disparity between crack and powder cocaine offenses.

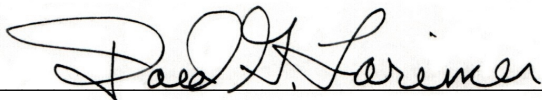
I have reviewed the original presentence report, my sentencing notes, as well as the transcript of sentencing on September 17, 2008. Based on that review, I believe that I would have imposed a non-trivially different sentence had I had the benefit of the teaching of *Kimbrough*. Therefore, I

vacate the Amended Judgment (Dkt. #57) and direct the Government to produce the defendant for re-sentencing.¹

CONCLUSION

The Amended Judgment entered December 6, 2007 is hereby vacated and the Government is directed to produce the defendant, Terrell Johnson, for re-sentencing. I schedule that sentencing proceeding for the **20th day of February, 2009 at 2:00 p.m.** I appoint attorney Scott M. Green, Esq., under the provisions of the Criminal Justice Act to represent Johnson on this proceeding. Green, of course, represented Johnson at the trial and on appeal to the Second Circuit. Defendant will have until the **29th day of December, 2008** to file a sentencing memorandum on the issue of re-sentencing. The Government, if it wishes, may file a memorandum in response on or before **January 23, 2009.**

IT IS SO ORDERED.



DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
November 19, 2008.

¹It appears that there may be a clerical error in the Amended Judgment. That Judgment reflects that the Court sentenced Mr. Johnson to 27 months on Count 1. The actual transcript of the sentencing, though, reflects that I sentenced Johnson at the low end of the Guideline range which was 21 months.